BRIEF IN SUPPORT OF PETITION.

I.

The Opinions of the Courts Below.

The District Court wrote no opinion. The Court of Appeals filed two opinions, neither of which has yet been reported, but which are both in the record (R. 78, 133).

II.

Jurisdiction.

The grounds on which the jurisdiction of this Court is invoked are stated in the foregoing petition (p. 5).

III.

Statement of the Case.

The case has been stated in the foregoing petition (pp. 1-5), which statement is hereby referred to and adopted as part of this brief.

IV.

Specification of Errors.

1. The Court of Appeals erred in affirming the order of the United States District Court for the District of Columbia.

2. The Court of Appeals erred in holding that the proceedings in the District Court constituted due process of law.

3. The Court of Appeals erred in holding that the corporate petitioner is subject to the Natural Gas Act.

4. The Court of Appeals erred in holding that the petitioners must comply with the subpoenas *duces tecum* issued by the Federal Power Commission.

V.

Summary of Argument.

When an administrative agency institutes an investigation and the respondent bona fide denies that the administrative agency has jurisdiction over it, and the administrative agency applies to a federal court for enforcement of a subpoena duces tecum issued by the administrative agency, the respondent is entitled to a full hearing in court on the question of jurisdiction, including the right to introduce all competent, relevant evidence, and to the decision by the courts of the question of jurisdiction so raised.

A local gas company, the property and operations of which are all within a single state and whose business essentially and predominantly is the production and gathering of natural gas and its distribution to ultimate consumers, is not subject to the Natural Gas Act, notwithstanding that it sells in the producing field a small fraction of its surplus gas at the rate charged industrial consumers to another company which transports the gas, sometimes after storing it in the state of production and purchase, to another state for resale to ultimate consumers, the company first mentioned being regulated as to all of its business, including the sale to the second company, by the state in which it operates.

ARGUMENT.

The denial of a full hearing, including the right to introduce competent and relevant evidence, on the question of jurisdiction of the Commission over the Company was a deprivation of property, we submit, without due process of law in violation of the Fifth Amendment to the United States Constitution. Because all of the Company's properties and operations are within the boundaries of the single State of Pennsylvania, because the Company's business is almost entirely confined to producing and gathering gas and furnishing it to residents and industries in western Pennsylvania, because the comparatively small amount of gas the Company sells to the New York State Natural Gas Corporation is on a more or less emergency basis, is merely incidental to the Company's business as a whole and is sold at the edge of the producing and gathering field in Pennsylvania and immediately upon completion of the production and gathering of the gas, because the New York State Natural Gas Corporation frequently stores the gas for months in Pennsylvania before removing it from that State, and because all of the Company's rates, including that charged the New York State Natural Gas Corporation, are regulated by the Pennsylvania Public Utility Commission, we submit that the Company comes within the exceptions in Section 1(b) of the Natural Gas Act above quoted (p. 5), providing that said Act shall not apply "to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

The Company, therefore, raised the question of jurisdiction when the Commission first began to investigate it and has consistently sought a legal adjudication of that question ever since. The Commission, however, has never decided the question of jurisdiction, despite

the fact that the Commission on June 14, 1940, directed the Company to show cause why it did not come within the application of the Natural Gas Act—that rule has never been acted on. When the controversy was taken to court, the petitioners promptly filed their answer denying that the Commission had jurisdiction over them, prayed for a full hearing at which they could introduce evidence on the question of jurisdiction, instead of the mere ten minutes which are allowed each party on the motions' calendar under the rules of the District Court for the District of Columbia, and brought their witnesses and evidence into court when the Commission's motion was scheduled for disposition. The District Court refused to hear any of the petitioners' evidence or to permit the petitioners to introduce any testimony or exhibits, but summarily, and without writing any opinion, granted the Commission's motion for enforcement of its subpoenas and denied the petitioners' motion for a full hearing, including the right to introduce evidence. Such procedure, we submit, is not in accordance with the law of this country and deprived petitioners of the fundamental right to a full hearing before subjecting them to a search of their private affairs and the enormous burden and expense of a comprehensive examination of the Company's costs, investments, revenue, depreciation, contracts, classifications and rates.

Interstate Commerce Commission v. Brimson, 154 U. S. 447, established the law that in a proceeding before a federal court to compel compliance with a subpoena of an administrative agency the respondent is entitled to a hearing and judicial determination of the question whether the administrative agency has jurisdiction over the respondent or the subject matter. This Court by Mr. Justice Harlan there said (p. 479):

"Suffice it in the present case to say that as the Interstate Commerce Commission, by petition in a Circuit Court of the United States, seeks, upon grounds distinctly set forth, an order to compel appellees to answer particular questions and to produce certain books, papers, etc., in their possession, it was open to each of them to contend before that court that he was protected by the Constitution from making answer to the questions propounded to him; or that he was not legally bound to produce the books, papers, etc., ordered to be produced; or that neither the questions propounded nor the books, papers, etc., called for relate to the particular matter under investigation, nor to any matter which the Commission is entitled under the Constitution or laws to investigate. These issues being determined in their favor by the court below, the petition of the Commission could have been dismissed upon its merits."

Ellis v. Interstate Commerce Commission, 237 U. S. 434 (Holmes, J.), is a leading case on the subject. The District Court there ordered compliance with an administrative subpoena but this Court reversed, holding that much of the information sought "concerned matters into which the Commission was not authorized to inquire."

In *Federal Power Commission v. Metropolitan Edison Co.,* 304 U. S. 375, this Court, in a unanimous opinion by Chief Justice Hughes, said of an application by the Federal Power Commission to a federal court for enforcement of the Commission's subpoena (p. 386):

"Upon such an application by the Commission for the enforcement of its order, respondents would have full opportunity to contest its validity."

Other cases holding that when an administrative agency applies to a federal court for enforcement of the

former's subpoena, the respondent is entitled to a full hearing before the court on the question of jurisdiction, and a judicial determination of that question, before being compelled to submit to the subpoena, are *Dupont de Nemours & Co. v. Boland,* 85 F. (2d) 12, 15 (C. C. A. 2); *East Ohio Gas Co. v. Federal Power Commission,* 115 F. (2d) 385 (C. C. A. 6); *Cudahy Packing Co. v. National Labor Relations Board,* 117 F. (2d) 692, 694 (C. C. A. 10); *General Tobacco & Grocery Co. v. Fleming,* 125 F. (2d) 596, 599 (C. C. A. 6); *Securities & Exchange Commission v. Tung Corp.,* 32 F. Supp. 371, 375 (Ill.); and *Perkins, Secretary of Labor, v. Endicott-Johnson Corp.,* 37 F. Supp. 604, 606; 40 F. Supp. 254, 255 (N. Y.). In the very recent *General Tobacco & Grocery Co.* case, *supra,* Judge Martin for the Circuit Court of Appeals for the Sixth Circuit said (p. 599):

> "It is unreasonable to assume that Congress intended that one who, when called upon to produce his books and records, denies that he is engaged in transactions within the purview of the Act should be refused a hearing upon that issue before his privacy is invaded in derogation of his individual immunity from unreasonable search of his papers and effects."

In the *Endicott-Johnson* case, *supra,* District Judge Bryant said (p. 606):

> "Viewing this controversy from a practical as well as a legal angle, a pre-determination of the right to examine before actual examination seems to be the logical course to follow. In these days of stress, when the time of courts, Government officials and manufacturers is at a premium, it would seem that a saving of both time and money may be effected through determination of right to examine before beginning the actual examination of hundreds and thousands of records."

As may readily be inferred from the subpoenas *duces tecum* involved in this case (R. 17), a multitude of books and records will be required to satisfy the Commission's demands in the instant case.

The text authorities agree that an administrative agency "may not obtain an order enforcing its subpoena unless it shall first have established its jurisdiction in the premises": 1 *Pike & Fischer* on "Administrative Law" § 44g.31.

Assuming that the question of jurisdiction of the Commission over the Company should be affirmatively decided before the Commission may lawfully subject the Company to a rate case, that question of jurisdiction, we submit, cannot be decided upon the present record. Whether the Commission has jurisdiction over this Company depends upon facts as well as law. The answer filed by the petitioners in the District Court, besides affirmatively pleading what the Company does in a general way, specifically denies that it transports natural gas in interstate commerce or that it sells natural gas in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial or any other use (R. 31). Questions of fact are, therefore, raised by the pleadings and many relevant facts concerning the sale to the New York State Natural Gas Corporation are not set forth in the Commission's motion or in the answer thereto, as hereinbefore pointed out (p. 3). For example, it is of vital concern under *Coe v. Errol,* 116 U. S. 517, 528, and *Federal Compress Co. v. McLean,* 291 U. S. 17, 21, that the gas purchased by the New York State Natural Gas Corporation from The Peoples Natural Gas Company is often stored by the former in Pennsylvania, thereby substantially interrupting its movement to New York. It is significant also under *Peoples Natural Gas Co. v. Public Service Commission,* 270 U. S.

550, 555, that the gas produced in the Pennsylvania field tributary to the point of delivery is more than sufficient to supply the amount sold to the New York State Natural Gas Corporation. Under the terms of the Natural Gas Act exempting therefrom the production and gathering of natural gas, and the construction placed by the Commission itself upon that language of the statute *In the Matter of Columbian Fuel Corp.,* 35 P.U.R. (N.S.) 3,[1] it is of utmost importance that the sale to the New York State Natural Gas Corporation is made and the gas delivered at the edge of the producing basin, upon completion of the producing and gathering of the gas. This Court has repeatedly held that the distribution and sale of gas to local consumers is intrastate commerce, and, therefore, subject to regulation or taxation by the states: *Public Utilities Commission v. Landon,* 249 U. S. 236, 245; *Missouri v. Kansas Gas Co.,* 265 U. S. 298, 309; *East Ohio Gas Co. v. Tax Commission,* 283 U. S. 465, 471; *Southern Gas Corp. v. Alabama,* 301 U. S. 148, 154;

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1. *In the Matter of Columbian Fuel Corp., supra,* the Commission held that it had no jurisdiction over a company which was engaged in producing and gathering natural gas in Kentucky and selling that gas in Kentucky at the termini of its gathering lines to another company, which latter company simply transported and resold the gas in interstate commerce for consumption outside Kentucky. There was a continuous and uninterrupted flow of gas from the producing fields in Kentucky to the consumers in other states. The conclusion of the Commission in that case is stated as follows (p. 10):

> "We conclude, therefore, that it was not the intention of Congress to subject to regulation under the Natural Gas Act all persons whose only sales of natural gas in interstate commerce, as in this case, are made as an incident to and immediately upon completion of such person's production and gathering of said natural gas and who are not otherwise subject to the jurisdiction of this Commission."

Memphis Natural Gas Co. v. Beeler, 10 U. S. L. W. 4309 (decided March 30, 1942). By analogy, the production and gathering of natural gas and its sale to another at the gathering point, the seller having no further control over the gas after said sale, is equally intrastate commerce and subject to regulation by the states—and this notwithstanding that the buyer intends immediately or later to transport the gas into another state for consumption there. This position is supported by such cases as *Coe v. Errol, supra; Kidd v. Pearson,* 128 U. S. 1; *McCluskey v. Marysville & Northern Ry. Co.,* 243 U. S. 36; *Federal Compress Co. v. McLean, supra;* and *Dep't. of Treasury of Indiana v. Wood Preserving Corp.,* 313 U. S. 62. In *McGoldrick v. Berwind-White Co.,* 309 U. S. 33, 47, this Court expressly placed the production, sale or other dealing with "property, shipped interstate, before its movement begins, or after it ends," in the same category, i. e., they are both intrastate commerce and subject to local regulation or taxation. Except to the negligible extent that the producer or gatherer of any commodity consumes it himself, it must be sold, and the sale of the commodity by the local producer or gatherer, at the place of production is, therefore, an incident to and part of the local, intrastate business of producing or gathering said commodity—regardless of the fact, as held in *Kidd v. Pearson, supra; Federal Compress Co. v. McLean, supra;* and *Dep't. of Treasury of Indiana v. Wood Preserving Corp., supra,* that the purchaser intends to remove the commodity outside the state of purchase. The production or gathering of goods is not an end in itself, and would be of little avail if the goods were not sold. Particularly in view of the legislative history of the Natural Gas Act, it is also highly material that the Pennsylvania Public Utility Commission has, since the Company's answer to the Commission's rule to show cause was filed, expressly taken jurisdiction over the rate charged

by the Company to the New York State Natural Gas Corporation for the gas sold to the latter. As said in *Missouri v. Kansas Gas Co., supra* (p. 309): "In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance." Under all of the above-cited authorities the regulation by the Pennsylvania Public Utility Commission of the rate in question is proper and valid. The legislative history of the Natural Gas Act shows that it was not intended to displace any state regulation of gas rates or to impose duplicate regulation. Other pertinent facts might be mentioned, but it is submitted that enough has been said to show that facts which are worthy at least of careful consideration, even if they may not be decisive in the petitioners' favor, have been excluded from consideration by the action of the District Court in summarily granting the Commission's motion without permitting the petitioners to introduce their evidence of facts bearing materially on the question of the Commission's jurisdiction over the Company. Because the court of first instance peremptorily refused to admit any evidence and rejected the petitioners' motion for a hearing on the facts, the case should be remanded, we submit, to the District Court to take evidence in order that the basic question of jurisdiction may be legally adjudicated.

The error committed by the Court of Appeals, we respectfully submit, was in attempting to decide the ultimate question whether the Company is subject to the jurisdiction of the Commission upon an inadequate record, which did not contain many pertinent facts bearing upon the determination of that ultimate question of jurisdiction. That the record is so inadequate is no fault of the petitioners, because they did their best to introduce evidence to establish the material facts in the court of first instance, but were denied that fundamental

right. The Court of Appeals bases its whole decision upon the mere recital in an *ex parte* order made by the Commission directing its counsel to invoke the aid of the United States District Court to enforce its subpoenas, to the effect that the testimony adduced at a certain hearing showed "that Peoples sells natural gas at its Pew compressor station in Clarion County, Pennsylvania, to New York State Natural Gas Corporation, an affiliated company, and that the latter immediately transports said natural gas into the State of New York where it sells the same to others for resale for ultimate public consumption" (R. 79). A copy of said order was attached as Exhibit "F" to the motion filed by the Commission in the District Court, but the only averment in said motion with reference to said Exhibit "F" was paragraph IX of said motion, reading as follows (R. 6): "By its order dated August 9, 1941, true copy of which marked 'Exhibit F' is annexed hereto and made a part of this motion, the Commission authorized that the aid of this Court be invoked pursuant to Section 14(d) of the Natural Gas Act to compel the compliance by said The Peoples Natural Gas Company and Edward M. Borger with the aforesaid subpoenas duces tecum." We do not dispute that the Commission made the *ex parte* order, Exhibit "F", or that by such order the Commission authorized its counsel to invoke the aid of the District Court, and, therefore, there was nothing in paragraph IX of the Commission's motion for us to deny in our answer. But it does not follow, we submit, that we agree that the gas is unqualifiedly "immediately" transported by the New York State Natural Gas Corporation from Clarion County, Pennsylvania, into New York State. On the contrary, as we would show by evidence, the New York State Natural Gas Corporation frequently stores the gas purchased by it from The Peoples Natural Gas Company in the ground in Tioga County, Pennsylvania, where the gas may remain for months

before it is finally transported into New York State. The Court of Appeals based its decision upon only a fragmentary knowledge of the situation, whereas actually there are other facts, unknown to the Court of Appeals and not appearing from the present record due to the action of the District Court in refusing to permit the petitioners to introduce any evidence, which materially enter into a correct determination of the question whether the Company involved—essentially a purely local enterprise, completely regulated by the state of its operations—is subject to the jurisdiction of the Federal Power Commission.

The legislative history of the Natural Gas Act clearly shows that it was not intended to apply to any of the gas industry which was already subject to regulation by the states, and that it was intended to apply only to the interstate pipe line companies which sold the gas which they transported at wholesale to distributing companies. Thus, in the report of the House Committee it is said of this Act[2]:

> "There is no intention in enacting the present legislation to disturb the States in their exercise of * * * jurisdiction. * * *
>
> The basic purpose of the present legislation is to occupy (the) field in which the Supreme Court has held that the States may not act. * * *
>
> The bill takes no authority from State commissions, and is so drawn as to complement and in no manner usurp State regulatory authority. * * *
>
> This legislation is highly desirable to fill the gap in regulation that now exists by reason of the lack of authority of the State commissions."

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2. House Report No. 709, 75th Cong., 1st Sess., 1937, pp. 1-3.

In the Senate debates over the Natural Gas Act it was said that "It is limited to transportation in interstate commerce, and it affects only those who sell gas wholesale."[3]

In the hearings on the legislation which ripened into the Natural Gas Act, Congressman Lea, who presided and by whose name the Natural Gas Act is popularly known, put as a question to the solicitor for the Federal Power Commission the precise situation involved in the case at bar:

> *Mr. Lea.* * * * Suppose that the A company owns a gas supply and the B company transmits it into another State, distributes it to a local company for distribution. Now suppose the question arises as to whether or not the charges which the A company makes against the B company for the gas is reasonable. What, if any, authority would the commission have on that question under this bill?
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> *Mr. DeVane* [solicitor for the Commission]. * * * Concerning the price paid to the A company, there is no control of the gathering rate; the Commission would not have jurisdiction.

Solicitor DeVane's conclusion was reiterated—that the proposed Natural Gas Act would confer no federal jurisdiction as to the "price that is paid to the gatherer" or "to the man that produces it."[4]

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3. 81 Cong. Rec. 9312. To the same effect see Hearings, House Committee on Interstate and Foreign Commerce, on H. R. 5423, 74th Cong., 1st Sess., Pt. 1, 1935, pp. 76-96 *et seq.; Id.* Pt. 3, pp. 1634, 1842, 1866, 1909; Hearings, Natural Gas, on H. R. 11662, 74th Cong., 2nd Sess., 1936, pp. 12, 17, 27, 40-42, 52, 81, 83, 85; House Report No. 2651, Natural Gas, on H. R. 12680, 74th Cong., 2nd Sess., 1936, pp. 1-3; 81 Cong. Rec. 6721-6725, 8918, 9312-9315.

4. Hearings, Natural Gas, on H. R. 11662, 74th Cong., 2nd Sess., 1936, pp. 12, 17.

In concluding its determination of the intent of Congress in passing the Natural Gas Act, the Commission in the *Columbian Fuel Corp.* case, *supra,* said (pp. 9-10):

> "Clearly, Congress thought it was closing the gap in regulation of the natural gas industry by providing Federal Power Commission regulation of companies whose main function was to transport natural gas through interstate pipe lines and sell gas so transported at city gates for resale to ultimate consumers."

A statute is to be interpreted in the light of its legislative history: *Apex Hosiery Co. v. Leader,* 310 U. S. 469, 489. This Court in *Maurer v. Hamilton,* 309 U. S. 598, also recently said (p. 614):

> "As a matter of statutory construction Congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose."

In the light of the legislative history of the Natural Gas Act, it would be clear if we had been permitted to show all the material facts that it was not intended to apply to The Peoples Natural Gas Company. There is no "gap" in the regulation of this Company; all of its operations and rates are regulated by the Pennsylvania Public Utility Commission, including specifically and expressly the rate charged the New York State Natural Gas Corporation. Furthermore, The Peoples Natural Gas Company is not one "whose main function [is] to transport natural gas through interstate pipe lines and sell gas so transported at city gates for resale to ultimate consumers."

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that a question of substance relating to the construction or application of a statute of the United States which has not been, but which should be, may be settled by this Court, and that the decision in this case be made to conform with applicable decisions of this Court, and that to such end a writ of certiorari should be granted and this Court should review the decision of the Court of Appeals for the District of Columbia and finally reverse it.

Respectfully submitted,

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